

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-1195

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket #76-1195

UNITED STATES OF AMERICA,

Appellant,

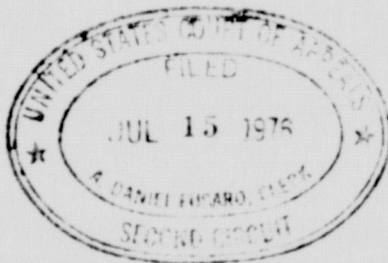
v.

ANTONIO FLORES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC
BY
DEFENDANT-APPELLEE



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ISSUES TO BE DECIDED

DID THE COURT OF APPEALS ERR IN FAILING TO RECOGNIZE THE FACT THAT THE SOVEREIGN STATE OF SPAIN HAS FORMALLY PROTESTED THE ACTIONS OF THE UNITED STATES DEPARTMENTS OF STATE AND JUSTICE, THE UNITED STATES DISTRICT COURT, AND THE UNITED STATES SECOND CIRCUIT COURT OF APPEALS, IN THAT THE HIGH COURT OF SPAIN'S DECISION IN REGARD TO PETITIONER HAS BEEN VIOLATED, AS HAS THE FORMAL PROMISE OF THE UNITED STATES GOVERNMENT TO ABIDE BY SAID DECISION.

PRELIMINARY STATEMENT

ANTONIO FLORES, defendant-appellee herein, respectfully petitions this Court for a rehearing en banc, of its decision of Judge Walter R. Mansfield, dated July 1, 1976 and opinion decided and filed July 1, 1976 in the above entitled case.

In an opinion by Judge Walter R. Mansfield, concurred in by Judge Murray I. Gurfein and Judge James L. Oakes, the Court held:

(a) "Upon this appeal by the government pursuant to Title 18 U.S.C. §3731 from a pre-trial ruling by Judge Bonsal of the United States District Court for the Southern District of New York barring the introduction into evidence of certain proof which the government proposes to offer at trial against the defendant-appellee, a fugitive who has been extradited from Spain to the United States, the central issue is whether admission of the evidence is precluded by the terms of an order of the High Court of Spain extraditing the defendant to this country. We hold that it is not precluded and reverse the district court's ruling." (See United States v. Flores, at Page 4831).

(b) We are not persuaded that the Spanish judges in extraditing Flores pursuant to the Geneva Convention, intended to violate two of its central proscriptions.⁴

We conclude, therefore, that the normal procedural and evidentiary rules of our domestic courts continue to control Flores' prosecution and that, subject to proper jury instructions, the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators are therefore admissible to the extent that they may demonstrate the existence of a conspiracy continuing into the date limits fixed by the Spanish Court and establish the intent and purposes of the conspirators during that period.⁵" (see Flores, supra, page 4843).

Judge Mansfield wrote that Judge Bonsal in the United States District Court for the Southern District of New York erred when he ruled that the high Court of Spain's decision in regard to the defendant-appellee barred the introduction of certain evidence falling outside of the period September 3, 1970 through April 30, 1971 because of the fact that this was an evidentiary question and/or was not contra to the Geneva Convention nor had the sovereign state of Spain actively shown its official displeasure as required by Fiocconni v. Attorney General, 462 F. 2d 475 (2d Cir.), cert. denied, 409 U.S. 1059 (1972) (see foot note 4 at page 4843 of the Opinion of Judge Mansfield).

STATEMENT OF FACTS

Appellee respectfully submits that the relevant facts concerning the instant case are as follows:

On January 8, 1973 a warrant of arrest was issued in the United States District Court for the Southern District of New York against Appellee Antonio Flores for the alleged crime of conspiracy to transport and sell narcotic drugs in violation of Sections 173 and 174 of Title 21, United States Code during the period between January 1, 1968 and April 30, 1971, Indictment No. 73CR 19. Another warrant of arrest, dated April 5, 1973, had been issued by the Grand Jury of the United States District Court for the Eastern District of New York, for the alleged crime of conspiracy to receive, conceal, buy, sell, and facilitate the transport and concealment of heroin and cocaine, narcotic drugs, after they had been brought illegally to and imported into the United States, which crime was allegedly committed between January 1 and August 31, 1968, according to said indictment.

On March 31, 1973 Appellee Flores was arrested in Spain as a fugitive and for possession of a small quantity of marijuana and a forged passport. Appellee was incarcerated in Barcelona's Men's Prison and has not been at liberty since that time.

The United States sought Flores' extradition and a hearing was had at Barcelona, Spain, on November 13, 1973 where all parties were duly represented. The United States requested

the Spanish Government to extradite Appellee Flores. An extradition hearing was held by a duly constituted Court in Spain, a three judge panel.

Appellee Flores originally opposed extradition before the Spanish Court on the grounds that neither the Extradition Treaty of 1904 nor the Extradition Treaty of May 29, 1970, which was entered into force June 16, 1971 (22 UST 737;TIAS 7136) was applicable to the period of the alleged conspiracy covered in the indictment, namely, January 1, 1968 to April 30, 1971.

The three judge panel that presided over the extradition hearing rendered it's decision on November 13, 1973. Presiding Judge Thomas Gonzalez Ramon Fernandez wrote the opinion for the panel of Examining Court No. 6 at Barcelona, Spain. The High Court of Spain held that:

The defense argument concludes with the statement that at that time neither the (Extradition) Treaty of 1904, nor the Treaty of 1970, now in force, was applicable. With respect to the Extradition Treaty of May 29, 1970, between Spain and the United States of America, in force since June 16, 1971, that statement is correct, and therefore the objection based on the lack of retroactive effects of the said Treaty is pertinent.

The High Court of Spain, also ruled that with respect to the Treaty of June 15, 1904 ratified by Spain April 6, 1908 and amended by the subsequent Convention for the Suppression of Illicit Traffic in Dangerous Drugs, signed at Geneva June 26, 1936 and ratified by the United States in 1947 acquired full force and effect in Spain on September 16, 1970 and in full

force as of September 3, 1970.

The Geneva Convention of 1936 was subsequently replaced by the Single Convention on Narcotic Drugs on March 30, 1961 and entered into full force and effect for the United States on June 24, 1967 and entered into full force and effect for Spain on March 1, 1966. (18 UST 1407; TIAS 6298).

That Articles 2 and 9 of the Treaty of 1904 covered any future treaty of extradition between Spain and the United States and, moreover, Article 2 also included "conspiracy" to commit, inter alia, offenses relating to the traffic of narcotic drugs.

The High Court of Spain granted the United States request for extradition of Flores stating however that it was "expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971 excluding any previous or subsequent acts (emphasis added) and, furthermore, it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforesaid person will not be prosecuted for previous offenses foreign to this extradition request unless he expressly consents to such prosecution. The High Court of Spain further held that:

"the requested extradition of the aforesaid Antonio Flores is denied with respect to the claim of Court of the Eastern District of New York and charges brought against him before the Court."

Prior, during and subsequent to the above stated Court hearings and/or decision with regard to extradition of the appellee, Flores, the Government of Spain through its Ministry

of Foreign affairs, on its own initiative, and relied upon by Appellee and Appellees legal representatives in Spain and in the United States entered into "negotiations" with the United States Embassy Spain. Said negotiations were extradition of Appellee, Flores, to assure Spain, Appellee Flores and his legal representatives that the Spanish Court's decision would be upheld by the Americans. On February 13, 1974, the American Embassy, representing the United States Department of State and Justice Department made a "formal Promise" to the Spanish Government, as required by the Spanish Court. Said "formal Promise" upon the Spanish Government, the appellee Flores, and his Spanish and American counsel. Said reliance resulted in Appellee Flores, on advice of his counsel, electing to waive any further rights of appeal in Spain on the issue of extradition. The Appellee relied on the decision of the Spanish Court as augmented by the "formal promise" of the United States to abide by said decision.

The Spanish Government also relied on said "formal promise", and extradited the appellee to the United States on February 14, 1974. Spain has evidenced its reliance on the aforementioned promise and expressed its displeasure of the actions of the United States Attorney's office in prosecuting the appellee herein and the trial court's actions in upholding the right of the United States Attorney of the Southern District of New York to prosecute the appellee Flores for acts falling outside of the period prescribed by the High Court of Spain (September 3, 1970 - April 30, 1971), by sending two formal notes of protest to the

United States Government; Official Communication No. 38 on or about June 3, 1976 stating that the "formal promise of the United States has not been honored".

Appellee Flores has remained incarcerated since the beginning of extradition proceedings in Spain. Appellee Flores has been and will continue to be subjected to American jurisdiction for "acts" outside of the time limit designated by Spain. This violation of jurisdiction has been condoned by a memorandum decision of Honorable Justice Dudley A. Bonsal, dated March 26, 1976 wherein the Court said:

".....the Government may introduce evidence of defendant's prior acts and conversations....."

The decision of the District Court was immediately rejected and protested by the Spanish Consulate in New York and Spanish Embassy in Washington on March 29, 1976.

The Government of Spain continued to protest the United States Attorney's actions and the actions of the Courts of the United States as exhibited by the making of the second formal protest on or about June 1, 1976, after having received all legal papers of this matter and having reviewed same.

".....the Formal Promise of February 13, 1974 by means of Verbal Note No. 136 of the United States Embassy in Madrid to the Spanish Government, has not been honored."

It should be further noted that the Government on or about June 14, 1976 filed papers in this Court which indicated

that Henry Kissenger, Secretary of State of the United States, on the 2nd of June, 1976 responded to by means of letters from Assistant United States Attorney, John Flannery, who is the prosecutor on this case and one Knute E. Malmberg, Jr., memorandum to the formal protests filed by the sovereign state of Spain dated April 7, 1976 (attached hereto as Exhibit "A"). Defendant-appellee respectfully notes that foot note 4 at page 4843 of Judge Mansfield decision attempts to brush aside this clearly distinguishable factor from the decision of Floccooni v. Attorney General.

Defendant-appellee respectfully notes that the Government has never supplied this honorable Court with a copy of the second formal protest filed by Spain dated on or about June 1, 1976. Defendant-appellee further notes to this honorable Court that subsequent to the filing of the written Opinion of Judge Mansfield the sovereign state of Spain once again formally protested to the United States Government. in regard to the decision to try Defendant-appellee for acts falling outside of the period designated by the Spanish high court, September 3, 1970 through April 30, 1971 (please see formal protest dated July 14, 1976, attached hereto as Exhibit "B").

The Spanish Embassy has advised Defendant-appellee that Assistant United States Attorney John Flannery personally communicated with the Spanish Consulate in New York in regard to the formal protests filed by the sovereign State of Spain in regard to the decisions of American Courts which violated the decision of the high court of Spain and the formal promise of the United States to abide by said decision.

POINT I

Judge Mansfield's decision fails to come to grips with the official protests of the sovereign State of Spain. There are now three formal protests by the sovereign State of Spain complaining of the activities of the American Courts in violation of the decision of the high court of Spain and the formal promise of the United States to abide with said extradition decision. This case, therefore, is clearly distinguishable from Floccconni v. Attorney General, 462 F.2d 475 (2d Cir.), cert. denied, 409 U.S. 1059 (1972).

Defendant-appellee further notes that in foot note 4 at Page 4843 Judge Mansfield wrote:

"Appellee seeks to bolster this suggestion by presenting two letters from the Spanish Consul General in New York, both addressed "To Whom It May Concern" and sent "[a]t the request of" Flores' wife, which appellee

labels formal notes of protest to the action of the government is seeking to broaden its proof against Flores. We do not find these letters to be persuasive, let alone compelling, evidence of Spain's official displeasure. Cf. *Fiocconni v. Attorney General*, supra. The government at oral argument labelled these communiques as unofficial letters prompted by Flores' family and denied that the State Department has received formal notes of protest from Spanish authorities. We are inclined to accept this representation by the government in deciding whether these documents are official intergovernmental communiques.

Judge Mansfield was obviously incorrect and relied on the statements of Assistant United States Attorney John Flannery on oral argument. Flannery was obviously incorrect and unfortunately the Court was persuaded by his statements and relied on his statements. It is respectfully argued that false representations under the circumstances should not be

countenanced by this honorable Court. Foot note 4 clearly illustrates the fact that Flannery's representations prejudiced Judge Mansfield. Such prejudice can only be rectified by a new hearing of the issues of this case.

It must be clear to this honorable court that a sovereign state has clearly objected to the procedures and decisions of the United States Courts in regard to defendant-appellee. The papers filed by the government on June 14, 1976 indicate that the government knew that Spain had formally protested and that such protest was not merely on the complaint of Mrs. Flores. The government never supplied to this honorable court the second note of formal protest of the sovereign state of Spain or any reply.

Defendant-appellee prays that this honorable court re-examine its decision that "We are not persuaded that the Spanish judges, in extraditing Flores pursuant to the Geneva Convention, intended to violate two of its central proscriptions.⁴" (Flores, supra. at Page 4843), in light of the fact that the Spanish Government once again formally protested the actions of the United States Government and its Courts in regard to Defendant-appellee.

WHEREFORE, Defendant-appellee argues that the decision below is clearly erroneous and should be reviewed at this time; that this honorable court has to the power to review this question at this time and that the exercise of that power will not cause undue delay in the trial of this action because of the fact that

it is not set down for trial until August 17, 1976.

CONCLUSION

For all of the reasons set forth above and in all of the previous papers and briefs submitted and on file with this Court, Defendant-appellee's Petition should be granted and the orders appealed from should be reviewed by this Court sitting in banc.

Respectfully submitted,

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Defendant-Appellee FLORES
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New York, New York 10022
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APPENDIX

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Letter and Formal Protest from Spain to the Department of State of the United States, dated April 8, 1976 (Exhibit A) ...	14
Formal Protest of Spain dated July 14, 1976 (in Spanish) -- Exhibit B ...	16
English Translation of Protest dated July 14, 1976 ...	20

2.

Attached it is included the judicial decree of extradition, the Verbal Note Nr. 136 as well as their translations and the decision of the U.S. Judge of the U.S. District Court.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., April 7, 1976

Department of State
Special Consular Services
Washington, D.C.



BEST COPY AVAILABLE

EXHIBIT "A"

RECEIVED
DEPARTMENT OF STATE

1976 APR 8 PM 3 19

P70052-0986

3 PM ADVISER

NANCY (3)

ACTION
is assigned to

DOCUMENT ANALYSIS

APR 1976

Embajada de España

MA/hr
Número 38

DEPARTMENT OF STATE

The Embassy of Spain presents its compliments to the Department of State and has the honor to inform that in reference to the judicial process by the U.S. District Court, Southern District of New York, against the North American citizen Antonio Flores, whose extradition was approved by Spain, by judicial decree from the "Audiencia Territorial" of Barcelona, Spain, The Honorable Judge Dudley B. Bonsal has granted the petition of the U.S. Attorney for the Southern District of New York allowing the presentation of acts and evidences committed prior to September 3, 1970.

Inasmuch as the judicial decree by the Spanish judicial authorities conditioned the extradition of the said North American citizen to be judged only and exclusively for the assumed offense of conspiring to brake the Sections 173 and 175 of the Title 21 of the U.S. Law Code and only by offenses committed during the period between September 3, 1970 and April 30, 1971, conditions formally assured by the U.S. Government in the Verbal Note No. 136 dated February 13, 1974 issued by the U.S. Embassy in Madrid, the Embassy of Spain requests the Department of State to inform the Department of Justice about this matter in order to assure the fulfillment of the content of the above mentioned Verbal Note.



Consulado General de España

Nueva York, 14 de Julio de 1976

Oficio Núm. 58

ASUNTO: Extradicción del súbdito
norteamericano Antonio FLORES
SERRANO.

EXCMO. SEÑOR:

Como continuación en último término de mi oficio nº 30 del 29 de Marzo de 1976 y en relación con su oficio nº 221 de 22 de Junio del mismo año, tengo la honra de comunicar a V.E. que Doña Esther Gómez de Flores, de nacionalidad española, esposa del mencionado Antonio Flores, se ha presentado de nuevo en este Consulado General para informarme que, después de la Nota Verbal nº 38 enviada por esa Embajada al Departamento de Estado en Washington y como consecuencia de las gestiones subsiguientes realizadas por dicho Departamento y el Departamento de Justicia, el Juez Bonsal decidió finalmente, en contra de la opinión del Fiscal, que no eran admisibles las pruebas presentadas que se referían a fechas anteriores al 3 de Septiembre de 1970.

EXHIBIT "B"

...//...



Ministerio General de España

Sin embargo, el Fiscal John P. Flannery apeló a la instancia superior para conseguir que dichas pruebas fueran de nuevo admitidas, lo que ha sucedido, estando en estos momentos la defensa del Sr. Flores tratando de conseguir una nueva apelación, esta vez al Tribunal Supremo, para prohibir definitivamente la recepción de dichas pruebas.

La interesada me señala que en la carta-informe del Fiscal John P. Flannery, de fecha 13 de Mayo de 1976, menciona (pág. 2 Apto. A de las fotocopias adjuntas) lo que el Juez Bonsal dictó el 24 de Enero de 1976 sobre introducción de las referidas pruebas, pero omite la decisión que el mismo Juez tomó el 13, 19 y 22 de Abril de 1976 (pág. 5, líneas 24-31 y pág. 6 líneas 1-15 de las fotocopias anejas) en donde el Tribunal excluía la presentación de pruebas o actos anteriores a la fecha del 3 de Septiembre de 1970 y posteriores al 30 de Abril de 1971.

Me señala asimismo la interesada que en la transcripción de los procedimientos para la apelación que nos ocupa, se dice en la pág. 8, líneas 18-21, que en la sentencia del Tribunal

...//...



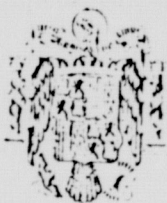
Consulado General de España

de Barcelona no se ha especificado por qué crímenes puede ser juzgado el Sr. Flores siendo así que, en la opinión de la interesada, en aquella sentencia se especificaba ^{claramente} que el Sr. Flores no puede ser juzgado por infracciones anteriores ni ajenas al sumario de la extradición.

De igual modo y en la misma transcripción a que me acabo de referir, existe una referencia en la pág. 13, líneas 14-16, a la Convención de Ginebra, en la cual se ignora por completo la promesa formal dada por el gobierno norteamericano a través de la Nota Verbal nº 126 de 13 de Febrero de 1974.

Por último, la interesada me destaca en la pág. ii de la Nota al Pie de la repetida transcripción, el párrafo contenido en las líneas 1-9, en el que el Fiscal, Sr. Flannery, actuando además como representante del gobierno de los EE.UU. niega la existencia de una Nota Verbal de protesta de esa Embajada al Departamento de Estado, siendo así que tal Nota Verbal, nº 38, con fecha 7 de Abril de 1976 fue efectivamente enviada desde esa Representación al Departamento de Estado.

...//...



-4-

Consulado General de España

En definitiva, la Corte de Apelaciones decidió a favor del Fiscal Flannery y en contra de la decisión del Juez Bonsal (District Court Southern District of New York) permitiendo la producción de pruebas sobre actos y hechos anteriores a la fecha establecida en la sentencia del Tribunal de Barcelona, violando así de nuevo el acuerdo y la promesa formal hechos por el Departamento de Justicia de los EE.UU. a través de su Embajada en Madrid, para obtener la extradición del Sr. Amador Flores.

La esposa (española) del interesado me ruega que de nuevo se obtenga, a través de la Embajada y ante el Departamento de Estado, el cumplimiento exacto del mencionado compromiso.

Dios guarde a V.E. muchos años.

EL CONSUL GENERAL
P.D.

Francisco J. Viqueira
Cónsul Adjunto

BEST COPY AVAILABLE

MO. SEÑOR EMBAJADOR DE ESPAÑA EN WASHINGTON

Consul General of Spain

New York, July 14, 1976

Official Note #58

MATTER of Extradition of United States
Citizen Antonio Flores Serrano

Most Excellent Sir:

As a continuation of my official letter #30 of March 39, 1976, I am concerning your official letter No. 221 of June 22nd of the same year. I have the honor of communicating at your Embassy with Mrs. Estelle Gomez de Flores, a Spanish National, wife of the above-mentioned Antonio Flores, has come again to this Consul General to inform us that after the Verbal Note No. 38 sent by that Embassy to the Department of State in Washington, and as a consequence of these subsequent actions taken by the State Department and the Department of Justice, the Judge Bonsal finally decided against the opinion of the U. S. Attorney that the evidence presented referring to dates prior to this September 3, 1970 was not admissible.

However, the U. S. Attorney, John P. Flannery, appealed to the Superior Court to obtain that said evidence was to be admitted, which has happened, and at this time, the defense of Mr. Flores is trying to obtain a new appeal, this time to the Supreme Court to forbid the introduction of said evidence.

The interested party has pointed out to me that in the report of the U. S. Attorney, John P. Flannery dated May 13, 1976, he mentioned on page 2 of the enclosed photocopies that the opinion of Judge Bonsal of January (sic) 24, 1976 about the introduction of said evidence, omits the decision again by the same Judge on the 13th, 19th and 22nd of April 1976 (page 5, lines 24 to 31; page 6, lines 1 to 15 of the enclosed photocopies) where the court was excluding the presentation of evidence of acts prior to the date of September 3, 1970 or after April 30, 1971.

The interested party (Mrs. Flores) also showed that in the transcript of the proceedings for this appeal, it is shown on page 8, lines 18-21, that the decree of the Court at Barcelona did not specify for ~~the~~ which crime Mr. Flores could be tried, and it is the opinion of the interested party that in that decree, it was very clearly specified that Mr. Flores could not be tried for any conduct or infraction of a non-alien prior to the indictment for the extradition.

In the same manner and in the same transcription that I am referring to, there is a reference on page 13, lines 14-16 to the Geneva Convention in which they completely ignore the former promise again by the U. S. Government on the Verbal Note #126 of February 13, 1974.

Lastly, the interested party shows me that on page ii of the Note at the foot of the mentioned transcription, the U. S. Attorney, Mr. Flannery, acting also as a representative of the U. S. Government, denies the existence of a Verbal Note protesting the issues by your Embassy to the Department of State, being said Note #38 dated April 7, 1976, which was affirmatively sent from that representation to the Department of State.

In conclusion, the Court of Appeals decided in favor of the United States Attorney, Flannery, and against the decision of the Judge Bonsal, District Court for the Southern District of New York, allowing the introduction of evidence of acts incurred prior to the established date in the decree of the Court of Barcelona, violating again the agreement and the former promise made by the Department of Justice of the United States through its Embassy in Madrid to obtain the extradition of Mr. Antonio Flores.

The wife of the interested party (a Spanish Citizen) again prays to obtain from your Embassy and before the Department of State, the exact promise (rule) of the mentioned agreement of compromise.

God bless your Excellency for many years.

THE CONSUL GENERAL
P.D.

[Signed]

Francisco J. Viqueria
Consul Adjunto

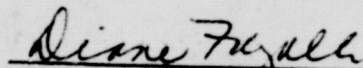
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

DIANE FUGALLI, being duly sworn, deposes and says: I am not a party to this action; I am over 18 years of age; I reside at Bayside, New York. On July 14th, 1976, I served the within Petition For Rehearing In Banc or for Rehearing upon the following:

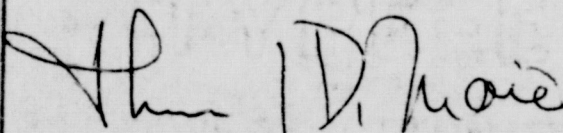
Clerk
Court of Appeals
Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

HON. ROBERT B. FISKE, JR.
United States Attorney
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Attn: AUSA John Flannery

being the addresses designated for those purposes by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


DIANE FUGALLI

Sworn to before me this
14th day of July, 1976.



THOMAS J. DIMAIO
Notary Public, State of New York
No. 31-008525
Qualified in New York County
Commission Expires March 30, 1978